



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93120; File No. SR-NYSEArca-2021-64]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change to Amend Rule 8.601-E (Active Proxy Portfolio Shares) to Provide for the Use of Custom Baskets

September 24, 2021.

I. Introduction

On July 28, 2021, NYSE Arca, Inc. (“Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Arca Rule 8.601-E (Active Proxy Portfolio Shares) to provide for the use of custom baskets consistent with the exemptive relief issued pursuant to the Investment Company Act of 1940 (“1940 Act”)³ applicable to a series of Active Proxy Portfolio Shares. The proposed rule change was published for comment in the Federal Register on August 12, 2021.⁴ The Commission has received no comments on the proposed rule change. The Commission is approving the proposed rule change.

II. Description

The Exchange proposes to amend NYSE Arca Rule 8.601-E, which permits the listing and trading of series of Active Proxy Portfolio Shares. NYSE Arca 8.601-E currently requires that Active Proxy Portfolio Shares be issued and redeemed in a specified minimum number of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 80a.

⁴ See Securities Exchange Act Release No. 92595 (August 6, 2021), 86 FR 44449.

shares, or multiples thereof, in return for the Proxy Portfolio⁵ and/or cash.⁶ The Exchange proposes to amend the definition of “Active Proxy Portfolio Share” in Rule 8.601-E(c)(1) to permit creations and redemptions of shares in return for a Custom Basket in addition to the Proxy Portfolio, to the extent permitted by a fund’s exemptive relief.⁷ Further, the Exchange proposes to define the term “Custom Basket” as a portfolio of securities that is different from the Proxy Portfolio and is otherwise consistent with the exemptive relief issued pursuant to the 1940 Act applicable to a series of Active Proxy Portfolio Shares.⁸ The Exchange also proposes to amend the definition of “Reporting Authority” in NYSE Arca Rule 8.601-E(c)(4) to include Custom Baskets among the types of information for which the Reporting Authority designated for a particular series of Active Proxy Portfolio Shares will be the official source for calculating and reporting such information.⁹

⁵ The term “Proxy Portfolio” means a specified portfolio of securities, other financial instruments and/or cash designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares as provided in the exemptive relief pursuant to the 1940 Act applicable to such series. See NYSE Arca Rule 8.601-E(c)(3). The term “Actual Portfolio” means the identities and quantities of the securities and other assets held by the Investment Company that shall form the basis for the Investment Company’s calculation of net asset value (“NAV”) at the end of the business day. See NYSE Arca Rule 8.601-E(c)(2).

⁶ See NYSE Arca Rule 8.601-E(c)(1) (defining the term “Active Proxy Portfolio Share”).

⁷ See proposed NYSE Arca Rule 8.601-E(c)(1) (defining “Active Proxy Portfolio Share” as a security that (a) is issued by an investment company registered under the 1940 Act (“Investment Company”) organized as an open-end management investment company that invests in a portfolio of securities selected by the Investment Company’s investment adviser consistent with the Investment Company’s investment objectives and policies; (b) is issued in a specified minimum number of shares, or multiples thereof, in return for a deposit by the purchaser of the Proxy Portfolio or Custom Basket, as applicable, and/or cash with a value equal to the next determined NAV; (c) when aggregated in the same specified minimum number of Active Proxy Portfolio Shares, or multiples thereof, may be redeemed at a holder’s request in return for the Proxy Portfolio or Custom Basket, as applicable, and/or cash to the holder by the issuer with a value equal to the next determined NAV; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter).

⁸ See proposed NYSE Arca Rule 8.601-E(c)(4). The Exchange proposes to renumber the remainder of NYSE Arca Rule 8.601-E(c). See proposed NYSE Arca Rule 8.601-E(c)(5) and (6).

⁹ See proposed NYSE Arca Rule 8.601-E(c)(5) (defining “Reporting Authority” in respect

The Exchange proposes to amend NYSE Arca Rule 8.601-E(d) to incorporate specific initial and continued listing criteria relating to Custom Baskets. Specifically, the Exchange proposes to add a new initial listing requirement to stipulate that the Exchange shall obtain a representation from the issuer of each series of Active Proxy Portfolio Shares that the issuer and any person acting on behalf of the series of Active Proxy Portfolio Shares will comply with Regulation Fair Disclosure under the Exchange Act (“Regulation FD”),¹⁰ including with respect to any Custom Basket.¹¹ The Exchange also proposes to add a new continued listing requirement that, with respect to each Custom Basket utilized by a series of Active Proxy Portfolio Shares, each business day, before the opening of trading in the Core Trading Session,¹² the Investment Company shall make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Proxy Portfolio only with respect to cash.¹³

Finally, the Exchange proposes to amend Commentaries .04 and .05 of NYSE Arca Rule 8.601-E, which contain requirements that specified parties must erect and maintain “fire walls”

of a particular series of Active Proxy Portfolio Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Active Proxy Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, NAV, the Actual Portfolio, Proxy Portfolio, Custom Basket, or other information relating to the issuance, redemption or trading of Active Proxy Portfolio Shares).

¹⁰ 17 CFR 243.100.

¹¹ See proposed NYSE Arca Rule 8.601-E(d)(1)(B)(iii). NYSE Arca Rule 8.601-E(d)(1)(B) currently provides that the Exchange shall obtain a representation from the issuer of each series of Active Proxy Portfolio Shares that the NAV per share for the series shall be calculated daily and that the NAV, the Proxy Portfolio, and the Actual Portfolio shall be made publicly available to all market participants at the same time. The Exchange proposes to renumber the current requirements as NYSE Arca Rule 8.601-E(d)(1)(B)(i) and (ii).

¹² The “Core Trading Session” begins for each security at 9:30 a.m. Eastern Time and ends at the conclusion of core trading hours or the core closing auction, whichever comes later. See NYSE Arca Rule 7.34-E(a)(2).

¹³ See proposed NYSE Arca Rule 8.601-E(d)(2)(B)(ii). The Exchange also proposes to amend the title of NYSE Arca Rule 8.601-E(d)(2)(B) to “Proxy Portfolio and Custom Basket.” See proposed NYSE Arca Rule 8.601-E(d)(2)(B).

with respect to access to information concerning the Actual Portfolio and Proxy Portfolio and enact procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Actual Portfolio and Proxy Portfolio. The Exchange proposes to amend these rules so that the requirements set forth therein would also cover information concerning Custom Baskets. As proposed to be amended, Commentary .04 would require that, if the investment adviser to the Investment Company issuing Active Proxy Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a “fire wall” between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company’s Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable. In addition, any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company’s Actual Portfolio, Proxy Portfolio, and/or Custom Basket, as applicable, or has access to non-public information regarding the Investment Company’s Actual Portfolio, the Proxy Portfolio, and/or the Custom Basket, as applicable, or changes thereto, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Actual Portfolio, the Proxy Portfolio, and/or the Custom Basket, as applicable, or changes thereto. As proposed to be amended, Commentary .05 would require that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to non-public information regarding the Investment Company’s Actual Portfolio, the Proxy Portfolio, or the Custom Basket, as applicable, or changes thereto, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Actual Portfolio, the Proxy Portfolio, or the Custom Basket, as applicable, or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a “fire wall” between the person or entity and the broker-dealer with respect to access to information

concerning the composition and/or changes to such Investment Company's Actual Portfolio, Proxy Portfolio, or Custom Basket, as applicable.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the Exchange Act and rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,¹⁵ which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission previously approved NYSE Arca Rule 8.601-E to permit the listing and trading of Active Proxy Portfolio Shares.¹⁶ As discussed above, under the current rule, a series of Active Proxy Portfolio Shares must create or redeem shares in return for the Proxy Portfolio and/or cash. The Exchange is now proposing to amend NYSE Arca Rule 8.601-E to allow a series of Active Proxy Portfolio Shares to create or redeem shares in return for a Custom Basket, which is a portfolio of securities that is different from the Proxy Portfolio, to the extent consistent with an issuer's exemptive relief under the 1940 Act.¹⁷ For the reasons discussed

¹⁴ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(5).

¹⁶ See Securities Exchange Act Release No. 89185 (June 29, 2020), 85 FR 40328 (July 6, 2020) (SR-NYSEArca-2019-95) (approving proposal to adopt Rule 8.601-E to permit the listing and trading of Active Proxy Portfolio Shares and to list and trade shares of the Natixis U.S. Equities Opportunities ETF) ("2020 Order"). The Exchange must file a separate proposed rule change pursuant to Section 19(b) of the Exchange Act for each series of Active Proxy Portfolio Shares. See NYSE Arca Rule 8.601-E, Commentary .01.

¹⁷ The Commission has granted exemptive relief under the 1940 Act to certain series of Active Proxy Portfolio Shares to permit the creation or redemption of shares using a

below, the Commission finds that the proposed amendments to NYSE Arca Rule 8.601-E to provide for the use of Custom Baskets for Active Proxy Portfolio Shares, to the extent permitted by an issuer's exemptive relief under the 1940 Act, are consistent with Section 6(b)(5) of the Exchange Act.

The Commission believes that the proposed changes to NYSE Arca Rule 8.601-E, Commentaries .04 and .05, are consistent with the Exchange Act and are reasonably designed to help prevent fraudulent and manipulative acts and practices. The Commission notes that, because Active Proxy Portfolio Shares do not publicly disclose on a daily basis information about the holdings of the Actual Portfolio, it is vital that key information relating to Active Proxy Portfolio Shares, including information relating to Custom Baskets, be kept confidential prior to its public disclosure and not be subject to misuse.¹⁸ Accordingly, the Commission believes that the Exchange's proposal to amend NYSE Arca Rule 8.601-E, Commentaries .04 and .05,¹⁹ to apply the current "fire wall" and other requirements contained therein to those that have access to information concerning, or make decisions pertaining to, the composition of and/or changes to the Custom Baskets, in addition to the existing requirements relating to the Actual Portfolio and the Proxy Portfolio, is designed to prevent fraud and manipulation with respect to Active Proxy Portfolio Shares.

The Commission also believes that the proposed amendments to the initial and continued listing requirements for Active Proxy Portfolio Shares are adequate to ensure transparency of information relating to Custom Baskets utilized by a fund and to ensure that such information is available to the rest of the market participants at the same time. Specifically, prior to the opening

Custom Basket that includes instruments that are not included, or included with different weightings, in the fund's Proxy Portfolio. See, e.g., Natixis Advisors, L.P., et al., Investment Company Act Release No. 34192 (February 9, 2021).

¹⁸ See 2020 Order, supra note 16, 85 FR at 40339.

¹⁹ See supra Section II, describing proposed NYSE Arca Rule 8.601, Commentaries .04 and .05.

of trading on each business day, the Investment Company will make publicly available on its website the composition of any Custom Basket transacted on the previous business day, except a Custom Basket that differs from the applicable Proxy Portfolio only with respect to cash.²⁰ In addition, prior to the initial listing of the Active Proxy Portfolio Shares, the Exchange will be required to obtain a representation from the issuer of each series of Active Proxy Portfolio Shares that the issuer and any person acting on behalf of the series of Active Proxy Portfolio Shares will comply with Regulation FD, including with respect to any Custom Basket.²¹ These measures help to mitigate concerns that certain information regarding the funds will be available only to select market participants and thereby helps to prevent fraud and manipulation.

The Commission notes that, as set forth in the definition of “Custom Basket,” a series of Active Proxy Portfolio Shares may only utilize Custom Baskets to the extent consistent with the exemptive relief issued pursuant to the 1940 Act applicable to such series.²² The Commission further notes that all series of Active Proxy Portfolio Shares will continue to be subject to the existing rules and procedures that govern the listing and trading of Active Proxy Portfolio Shares and the trading of equity securities on the Exchange.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act²³ that the proposed rule change (SR-NYSEArca-2021-64), be, and it hereby is, approved.

²⁰ See proposed NYSE Arca Rule 8.601-E(d)(2)(B)(ii).

²¹ See proposed NYSE Arca Rule 8.601-E(d)(1)(B)(iii). The Commission notes that a fund’s use of, or conversations with authorized participants about, Creation Baskets that would result in selective disclosure of non-public information would effectively be limited by the funds’ obligation to comply with Regulation Fair Disclosure. See, e.g., Natixis ETF Trust II, et al., Investment Company Act Release No. 34171 (January 12, 2021).

²² See proposed NYSE Arca Rule 8.601-E(c)(4).

²³ 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

J. Matthew DeLesDernier,

Assistant Secretary.

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²⁴ 17 CFR 200.30-3(a)(12).